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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

NO. 855

COMMONWEALTH EX. REL. JAMES F. TORRANCE,
Petitioner

v.

JOSEPH SALZINGER, Warden of the Dauphin County Prison, Respondent

PETITIONER'S REPLY BRIEF

ELDER W. MARSHALL
GILBERT J. HELWIG
REED SMITH SHAW & MCCLAY
Attorneys for Petitioner

747 Union Trust Building
Pittsburgh 19, Pa.

TABLE OF CASES

	PAGE
Cox v. United States, 332 U.S. 442; 68 S.C. 115; 92 L. Ed. 59 (1957)	1
Dickinson v. United States, 346 U.S. 389; 74 S.C. 152; 98 L. Ed. 132 (1953)	2
Gibson v. United States, 329 U.S. 338; 67 S.C. 301; 91 L. Ed. 331 (1946)	3
In Re Greenburg, 16 N.J. 132; 104 At. 2d 46 (1934)	4
New York Central v. Johnson, 279 U.S. 310; 49 S.C. 300; 73 L. Ed. 706 (1929)	5
Rochin v. California, 342 U.S. 165; 72 S.C. 205; 96 L. Ed. 183 (1952)	6

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I.

The reason given by petitioner for granting the writ is the need for this Court's choice between the dichotomy of "no evidence" and "no evidence sufficient in reason" to support a finding.[1] The existing ambiguity in this important developing area of law can be dispelled without this Court's being required to inquire closely into the sufficiency of the evidence to support petitioner's conviction. If the law were declared and clarified, its application could be left to the Court below, upon ap-

1. The ramifications of the distinction have concerned this Court in other applications. See *Dickinson v. United States*, 346 U.S. 389, 397, 398; 74 S. C. 152; 98 L. Ed. 132 (1953). See also the dissenting opinion of Mr. Justice Murphy in *Cox v. United States*, 332 U.S. 442, 457, 458; 68 S. C. 115; 92 L. Ed. 59 (1957).

propriate remand. See *Gibson v. United States*, 329 U.S. 338, 351; 67 S. C. 301; 91 L. Ed. 331 (1946).

On the other hand, if this Court should undertake to inquire into the sufficiency of the evidence to support petitioner's conviction, the inquiry would end as soon as it should find any evidence which would in reason sustain a finding of guilt. Only if petitioner's argument that there is no such evidence is well taken would such an inquiry require the examination of the entire record. If petitioner's position is well taken, (and petitioner is therefore an innocent man serving an unjust sentence imposed at the twilight of an honest life), it would be neither unprecedented nor inappropriate for this Court to make such examination.

II.

It did not seem appropriate to petitioner to draw this Court into a close scrutiny of the testimony at petitioner's trial in connection with the application for certiorari. Three of the seven Pennsylvania Superior Court judges who heard the appeal concluded that there was insufficient evidence to sustain a finding of petitioner's guilt; two of the six Pennsylvania Supreme Court justices reached the same conclusion. The Court of Appeals for the Third Circuit did not summarily dismiss petitioner's contention about the insufficiency of the evidence, but, rather, invited petitioner so submit the constitutional implications of the issue to the Pennsylvania courts, significantly reserving decision on the ultimate proper disposition of the case if it should be again presented to it.

The opinions of these jurists attest that there is more merit in petitioner's contention that his conviction is without evidentiary support in the record than appears from the respondent's statement of the evidence. (Brief in opposition, pp. 3-9) This is in part attributable to respondent's failure to state the facts with fairness and candor, in order that this Court might have before it a "balanced order of facts, exactly and fairly stated." Compare *Rochin v. California*, 342 U.S. 165, 172; 72 S. C. 205; 96 L. Ed. 183 (1952).

It is not possible, without a complete emendation of the Brief in Opposition, to point out all the respects in which respondent's statement of the facts departs from the standards to which parties should hold themselves in a case such as this. See, *In Re Greenburg*, 15 N. J. 132; 104 At. 2d. 46, 47 (1954); *New York Central v. Johnson*, 279 U.S. 310, 319; 49 S. C. 300; 73 L. Ed. 706 (1929). One or two illustrations will demonstrate the validity of this criticism.

On page 8 of respondent's Brief in Opposition, it is stated that the basic contract through which the alleged fraud was accomplished had been originally classified as an engineering contract to avoid competitive bidding, but that after it had been awarded, the contract was reclassified as a construction contract, in order to expedite payments thereunder. It is argued that if petitioner had honestly believed it was an engineering contract, the assignment of a construction number to it, coupled with the rapid succession of huge payments, should have acted as a warning to him.

The facts are that there was *no* testimony in the record which supports respondent's assertion that the contract was originally classified as an engineering con-

tract in order to avoid competitive bidding. On the contrary, even the evidence in the Commonwealth's case establishes that everyone concerned with the matter believed, at least at the outset, that the Manu-Mine contract involved engineering work, rather than construction work (69a*, 98a, 509r-516r**, 820r, 824r, 842a, 1221r).

Similarly, respondent's assertion that the contract was given a number "because" classifying it as a construction contract expedited payments is without support in the record. The facts are that this number was assigned to the contract by the Finance Director of the Turnpike Commission, entirely on his own initiative. The Pennsylvania Superior Court, held as a matter of law that nothing which had been done by this officer had "aided in the perpetration of the fraud." (See Opinions of Court below, page 76a).

The reference to the "rapid succession of huge payments" is likewise inexact and inaccurate. It disregards the fact that the total amount being spent by the Turnpike Commission for the Northeast Extension was in excess of $200,000,000, and the original estimates put the cost of the Manu-Mine work at four million so that the payment of even several million dollars to Manu-Mine would not, in this context, necessarily seem remarkable. It was originally estimated that the cost of the Manu-Mine work would be four million dollars and would take six months. The payments which were made to Manu-Mine did not exceed four million dollars until the middle of December. (Commonwealth's Exhibit 42, 619r) Thus, contrary to respondent's statement, the pay-

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* Reference is to the record in the Court of Appeals.

** Reference is to the trial transcript.

ments were consistent in amount and in time with the estimates known to petitioner.

It should also be kept in mind that petitioner's approval of the payments was preceded by the approval of a number of accountants, engineers and others, none of whom has been convicted of any wrong doing in connection with this matter. The payments were likewise approved unanimously by the other members of the Turnpike Commission including the Pennsylvania Secretary of Highways (619r, 625r-639r). Petitioner's role in making and approving the payments was in no way different from that of any other Commissioner. His signatures on the checks which were drawn were facsimile signatures put on as a matter of routine by employees of the Commission. (915r, 950r, 966r)

On pages 5 and 6 of the Brief in Opposition, respondent suggests that petitioner knowingly made false representations to other members of the Turnpike Commission concerning the qualifications of Manu-Mine to perform the work called for under the challenged contract.

This assertion is premised entirely upon an interpretation of two sentences in the testimony of one witness at petitioner's trial. (569r, 570r) The one sentence is to the effect that petitioner *or perhaps someone else* discussed the importance of the Manu-Mine contract and its relation to the overall construction job with the other members of the Commission before the contract was approved. (569r) The witness also stated that petitioner *or someone else* pointed out that Manu-Mine had an international reputation, was an outstanding firm and was the only one qualified to do the job at the time. (570r)

This testimony, insofar as it attributes these remarks to petitioner, is of no probative value, not only because of the ambiguous way in which it is stated, but because it conflicts with the minutes of the meeting which attribute the remarks to someone other than petitioner; it is in conflict with the testimony of the same witness at other parts of the record, and the witness confessed on cross-examination that he was unable to specify who had participated in the discussion or to remember any of its details. (680r, 802r)

Thus, the serious accusation in respondent's brief that petitioner had made these representations to the Commission rests upon discredited, equivocal testimony which, by its very wording, shows that it is nothing more than a guess of the witness. (569r, 570r)

In addition, the trial record is entirely devoid of evidence that the representations thus attributed to petitioner were untrue. There is nothing to show that Manu-Mine Company was not, in fact, a company of international reputation or that it was not, in fact, peculiarly fitted to do the work called for by the contract. Respondent points derisively to the fact that it commenced from humble beginnings with small capital, and at the time of the contract owned but a single drill. However, this company did a vast amount of drilling work pursuant to the contract, which work was approved after its inspection by numerous people, including engineers of the Pennsylvania Department of Highways.

Moreover, before the award of the disputed contract, this company had done quite satisfactory work of a unique kind for the Commission. One of the principal

witnesses for the Commonwealth, a representative of the Pennsylvania Department of Mines, conceded that the information collected by this company under its earlier contracts with the Commission was "excellent." (2061r)

The uniqueness of the service offered by Manu-Mine is demonstrated by the fact, established in the testimony of other Commonwealth witnesses, that efforts to get cost estimates for the work from other companies, including one of the largest drilling companies in Pennsylvania, were not successful because such companies did not engage in such work and were unable even to provide cost estimate data. (2372r-2377r, 2380r) Thus, there is nothing in the record to support respondent's insinuation that petitioner made representations to the other members of the Commission concerning the Manu-Mine Company, or that the representations attributed to him were known to be false.

There are many other unsupported and unwarranted statements in respondent's "summary of the evidence." Therefore, this Court should not conclude, without plenary hearing or full briefs on the matter, that the evidence in reason supports a finding of petitioner's guilt.

Respectfully submitted,

ELDER W. MARSHALL
GILBERT J. HELWIG
REED SMITH SHAW & MCCLAY
Attorneys for Petitioner